



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 70 and 71

[EPA-HQ-OAR-2016-0186; FRL-8961-01-OAR]

RIN 2060-AV39

Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and the Federal Operating Permit Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is re-proposing a document, first proposed in 2016, which would remove the emergency affirmative defense provisions found in the regulations for state and federal operating permit programs under the Clean Air Act (CAA). The purpose of these provisions has been to establish an affirmative defense that sources can assert in civil enforcement cases when noncompliance with certain emission limitations in operating permits occurs because of qualifying “emergency” circumstances. These provisions, which have never been required elements of state operating permit programs, are being removed because they are inconsistent with the enforcement structure of the CAA and court decisions from the U.S. Court of Appeals for the D.C. Circuit. The removal of these provisions is consistent with other EPA actions involving affirmative defenses and would harmonize the enforcement and implementation of emission limitations across different CAA programs.

DATES: Comments must be received on or before **[INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Public hearing: If anyone contacts EPA requesting a public hearing by **[INSERT DATE 5 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, the EPA will hold a virtual public hearing. See **SUPPLEMENTARY INFORMATION** for information on

requesting and registering for a public hearing.

ADDRESSES: *Comments:* You may send comments, identified by Docket ID No. EPA-HQ-OAR-2016-0186, by any of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov/> (our preferred method).
Follow the online instructions for submitting comments.
- E-mail: a-and-r-docket@epa.gov. Include Docket ID No. EPA-HQ-OAR-2016-0186 in the subject line of the message.
- Fax: (202) 566-9744. Attention Docket ID No. EPA-HQ-OAR-2016-0186.

Instructions: All submissions received must include the Docket ID No. EPA-HQ-OAR-2016-0186 for this rulemaking. Comments received may be posted without change to <https://www.regulations.gov/>, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are open to the public by appointment only to reduce the risk of transmitting COVID-19. Our Docket Center staff also continues to provide remote customer service via email, phone, and webform. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at <https://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT: For information about this proposed rule, contact Corey Sugerik, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504-05), Environmental Protection Agency, Research Triangle Park, NC; telephone number: 919-541-3223; email address: sugerik.corey@epa.gov.

SUPPLEMENTARY INFORMATION:

The information presented in this document is organized as follows:

- I. General Information
- II. Background
- III. Proposed Action
- IV. Implementation
- V. Environmental Justice Considerations
- VI. Statutory and Executive Order Reviews
- VII. Statutory Authority

I. General Information

A. Entities Potentially Affected by this Action

Entities potentially affected by this proposed rulemaking include federal, state, local and tribal air pollution control agencies that administer title V operating permit programs, and owners and operators of emissions sources in all industry groups who hold or apply for title V operating permits.

B. Obtaining a Copy of this Document and Other Related Information

The EPA has established a docket for this rulemaking under Docket ID No. EPA-HQ-OAR-2016-0186. All documents in the dockets are listed in <https://www.regulations.gov/>. Although listed, some information is not publicly available, *e.g.*, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy. Publicly available docket materials are available either in the docket for this action, Docket ID No. EPA-HQ-OAR-2016-0186, or electronically at <https://www.regulations.gov/>.

In addition to being available in the docket, an electronic copy of this *Federal Register* document will be posted at <https://www.epa.gov/title-v-operating-permits/current-regulations-and-regulatory-actions>.

C. Preparing Comments for the EPA

Instructions. Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2016-0186, at <https://www.regulations.gov> (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the

docket. The EPA may publish any comment received to its public docket. Do not submit to EPA's docket at <https://www.regulations.gov> any information you consider to be CBI or other information whose disclosure is restricted by statute. This type of information should be submitted by mail as discussed below.

Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

Due to public health concerns related to COVID-19, the EPA Docket Center and Reading Room are open to the public by appointment only. Our Docket Center staff also continues to provide remote customer service via email, phone, and webform. Hand deliveries or couriers will be received by scheduled appointment only. For further information and updates on EPA Docket Center services, please visit us online at <https://www.epa.gov/dockets>.

The EPA continues to carefully and continuously monitor information from the Centers for Disease Control and Prevention (CDC), local area health departments, and our Federal partners so that the Agency can respond rapidly as conditions change regarding COVID-19.

Submitting CBI. Do not submit information containing CBI to the EPA through <https://www.regulations.gov/>. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on any digital storage media that you mail to the EPA, mark the outside of the digital storage media as CBI and then identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI directly to the public docket

through the procedures outlined in *Instructions*. If you submit any digital storage media that does not contain CBI, mark the outside of the digital storage media clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2. Our preferred method to receive CBI is for it to be transmitted electronically using email attachments, File Transfer Protocol (FTP), or other online file sharing services (e.g., Dropbox, OneDrive, Google Drive). Electronic submissions must be transmitted directly to the OAQPS CBI Office using the email address, oaqpscbi@epa.gov, and should include clear CBI markings as described later. If assistance is needed with submitting large electronic files that exceed the file size limit for email attachments, and if you do not have your own file sharing service, please email oaqpscbi@epa.gov to request a file transfer link. If sending CBI information through the postal service, please send it to the following address: OAQPS Document Control Officer (C404-02), OAQPS, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA-HQ-OAR-2016-0186. The mailed CBI material should be double wrapped and clearly marked. Any CBI markings should not show through the outer envelope.

D. Participation in Virtual Public Hearing

Please note that because of the current CDC recommendations, as well as state and local orders for social distancing to limit the spread of COVID-19, the EPA cannot hold in-person public meetings at this time.

To request a virtual public hearing, contact Ms. Pamela Long at (919) 541-0641 or by email at long.pam@epa.gov. If requested, the virtual hearing will be held on **[INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. The hearing will convene at 9:00 a.m. Eastern Time (ET) and will conclude at 3:00 p.m. ET. The EPA may close a session 15 minutes after the last pre-registered speaker has testified if there are

no additional speakers. The EPA will announce further details at <https://www.epa.gov/title-v-operating-permits/current-regulations-and-regulatory-actions>.

Upon publication of this document in the *Federal Register*, the EPA will begin pre-registering speakers for the hearing, if a hearing is requested. To register to speak at the virtual hearing, please use the online registration form available at <https://www.epa.gov/title-v-operating-permits/current-regulations-and-regulatory-actions> or contact Ms. Pamela Long at (919) 541-0641 or by email at long.pam@epa.gov. The last day to pre-register to speak at the hearing will be **[INSERT DATE 12 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Prior to the hearing, the EPA will post a general agenda that will list pre-registered speakers in approximate order at: <https://www.epa.gov/title-v-operating-permits/current-regulations-and-regulatory-actions>.

The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearings to run either ahead of schedule or behind schedule.

Each commenter will have five minutes to provide oral testimony. The EPA encourages commenters to provide the EPA with a copy of their oral testimony electronically (via email) by emailing it to long.pam@epa.gov. The EPA also recommends submitting the text of your oral testimony as written comments to the rulemaking docket.

The EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral testimony and supporting information presented at the public hearing.

Please note that any updates made to any aspect of the hearing will be posted online at <https://www.epa.gov/title-v-operating-permits/current-regulations-and-regulatory-actions>. While the EPA expects the hearing to go forward as set forth above, please monitor our website or contact Ms. Pamela Long at (919) 541-0641 or by email at long.pam@epa.gov to determine if

there are any updates. The EPA does not intend to publish a document in the *Federal Register* announcing updates.

If you require the services of a translator or special accommodations such as audio description, please pre-register for the hearing with Ms. Pamela Long and describe your needs by **[INSERT DATE 7 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. The EPA may not be able to arrange accommodations without advanced notice.

II. Background

The EPA has promulgated permitting regulations for the operation of major and certain other sources of air pollutants under title V of the CAA. These regulations, codified in 40 CFR parts 70 and 71, contain the requirements for state operating permit programs and the federal operating permit program, respectively. These regulations currently contain identical provisions describing an affirmative defense that sources may be able to assert in enforcement actions brought for noncompliance with technology-based emission limitations caused by specific emergency circumstances. These “emergency” affirmative defense provisions are located at 40 CFR 70.6(g) and 71.6(g).

In 2016, the EPA proposed a rule to remove these affirmative defense provisions from the title V regulations. 81 FR 38645 (June 14, 2016), also available online at: <https://www.govinfo.gov/content/pkg/FR-2016-06-14/pdf/2016-14104.pdf> (the 2016 Proposal). The 2016 Proposal contains a detailed discussion of the background for this proposal, as well as the purpose, basis, rationale, and legal justification for this proposal. The EPA directs readers to the 2016 Proposal for further information. In summary, the EPA based the 2016 Proposal on the interpretation that the enforcement structure of the CAA, embodied in sections 113 and 304, precludes affirmative defense provisions that would operate to limit a court’s authority or discretion to determine the appropriate remedy in an enforcement action. 81 FR 38650. This interpretation is informed by the 2014 *NRDC v. EPA* decision from the U.S. Court of Appeals for

the D.C. Circuit.¹ The EPA believes that the reasoning and logic of that decision extend to regulations concerning operating permit programs under title V. This view aligns the EPA's position on affirmative defenses in title V with positions taken in other CAA program areas, including EPA policy relating to the treatment of startup, shutdown, and malfunction (SSM) periods in state implementation plans (SIPs). (The EPA's policy with respect to SIPs is discussed in an action taken in 2015, *see* 80 FR 33839 (June 12, 2015) (the 2015 SSM SIP Policy), and in the Agency's September 30, 2021, memorandum reinstating the 2015 SSM SIP Policy.²) This title V interpretation also aligns with EPA's position on affirmative defenses in New Source Performance Standards (NSPS) under CAA section 111 and National Emission Standards for Hazardous Air Pollutants (NESHAP) under CAA section 112.³

The EPA did not finalize the 2016 Proposal. Instead, in a notation accompanying the Spring 2018 Unified Agenda of Federal Regulatory and Deregulatory Actions, the EPA stated: "The EPA is withdrawing this action via the reg agenda because the agency does not plan to move forward with this rulemaking due to other pending priorities."⁴

Although the EPA did not move forward at that time with the proposal to remove the emergency affirmative defense provisions from the Title V regulations, the EPA continued to evaluate SSM provisions, including affirmative defenses, in SIPs. In October 2020, the EPA

¹ 749 F.3d 1055 (D.C. Cir. 2014).

² *See* Memorandum, Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy, 3–4 (September 30, 2021), available at <https://www.epa.gov/system/files/documents/2021-09/oar-21-000-6324.pdf> (September 2021 SSM SIP Memo).

³ *E.g.*, 85 FR 71490 (November 9, 2020) (proposed rule removing affirmative defense from the NESHAP for polyvinyl chloride and copolymers production); 81 FR 40955 (June 23, 2016) (final rule removing affirmative defense from the NSPS and emission guidelines for commercial and institutional solid waste incineration units); *see also* 81 FR 38649 n.21 (June 14, 2016) (discussion of other NSPS and NESHAP rules in 2016 Proposal).

⁴ A copy of the entry on the Regulatory Agenda is available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=2060-AS96>. *See also* <https://www.regulations.gov/docket/EPA-HQ-OAR-2016-0186/unified-agenda> (indicating that the proposed rule was withdrawn on February 23, 2018).

issued a guidance memorandum that, among other things, expressly superseded a portion of the EPA’s interpretation of affirmative defenses presented in the 2015 SSM SIP Policy.⁵ However, on September 30, 2021, the EPA issued a guidance memorandum that withdrew the October 2020 memorandum in its entirety and reinstated the legal and policy positions expressed in the 2015 SSM SIP Policy in their entirety.⁶ Thus, the EPA’s current interpretation of affirmative defenses in the context of SIPs is the interpretation set out in the 2015 SSM SIP Policy. As noted in a preceding paragraph, this interpretation in the context of SIPs is similar to the interpretation expressed in the 2016 Proposal for the title V rules.

III. Proposed Action

In this action, the EPA is again proposing to remove the title V emergency affirmative defense provisions, 40 CFR 70.6(g) and 71.6(g). These provisions are inconsistent with the EPA’s interpretation of the CAA’s enforcement structure and court decisions from the U.S. Court of Appeals for the D.C. Circuit—primarily the 2014 *NRDC v. EPA* decision. In summary, the EPA interprets the enforcement structure of the CAA, embodied in sections 113 and 304, to

⁵ Memorandum, Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans, 6 (October 9, 2020), available at <https://www.epa.gov/system/files/documents/2021-09/2020-ssm-in-sips-guidance-memo.pdf>. In 2020, EPA also took action relating to an SSM-related affirmative defense in a SIP for Texas, withdrawing a SSM “SIP call” in part because the SIP-based affirmative defense was deemed to not be inconsistent with the CAA. *See* 85 FR 7232 (February 7, 2020); *see also* 85 FR 23,700 (April 28, 2020) (SIP call withdrawal relating to North Carolina) and 85 FR 73,218 (November 17, 2020) (SIP call withdrawal relating to Iowa). Petitions for review of these withdrawal actions were filed in the United States Court of Appeals for the D.C. Circuit. *See Sierra Club v. EPA*, No. 20-1115.

⁶ September 2021 SSM SIP Memo, *supra* note 2. This memorandum also announced an intent to revisit, among other things, the 2020 action withdrawing the SSM affirmative defense-related SIP call for Texas. *Id.* at 5. On December 17, 2021, the United States Court of Appeals for the D.C. Circuit granted the EPA’s request for a voluntary remand of that 2020 Texas SIP call withdrawal action, as well as the similar SIP call withdrawal actions relating to North Carolina and Iowa, in light of EPA’s stated intent to reconsider those actions. *Sierra Club v. EPA*, No. 20-1115.

preclude affirmative defense provisions that would operate to limit a court's authority or discretion to determine the appropriate remedy in an enforcement action. The title V affirmative defense provisions the EPA proposes to remove, 40 CFR 70.6(g) and 71.6(g), set forth just such limitations and, consequently, are inconsistent with the rationale of *NRDC* and the enforcement structure of the CAA. The Agency's view that these title V affirmative defense provisions are inconsistent with the CAA and D.C. Circuit precedent is consistent with the EPA's current interpretation of affirmative defenses in the context of other CAA programs, including SIPs and regulations under CAA sections 111 and 112.⁷

Except as modified or updated herein, the EPA is re-proposing the 2016 Proposal. The EPA previously received comments on the 2016 Proposal, including the legal interpretation upon which that former proposal—and the current proposal—are based. The EPA will consider all comments received on the 2016 Proposal as the Agency moves forward with the current rulemaking. Accordingly, commenters need not submit duplicate comments on the current proposal.⁸ However, the EPA welcomes comments providing additional information not previously submitted to the Agency.

IV. Implementation

The nature and focus of the proposed action are to remove the affirmative defense provisions from the EPA's regulations at 40 CFR 70.6(g) and 71.6(g). The EPA is not proposing any specific finding with respect to individual state programs or state-issued title V permits that may contain similar provisions. However, if the EPA finalizes this rule as proposed and removes the affirmative defense provisions at 40 CFR 70.6 and 71.6, the Agency expects that some state, local, and tribal permitting authorities will need to remove similar provisions from their EPA-

⁷ See September 2021 SSM SIP Memo. The EPA's interpretation with respect to affirmative defenses in regulations under CAA sections 111 or 112 has not changed since the 2016 Proposal. See *supra* note 3 and accompanying text.

⁸ Comments received on the 2016 Proposal are contained in the same docket as the current proposal: Docket ID No. EPA-HQ-OAR-2016-0186.

approved part 70 program regulations and submit program revisions to the EPA. The EPA also expects that these permitting authorities will need to remove such provisions from individual title V permits. This process will proceed consistent with the existing regulations concerning program and permit revisions. *See, e.g.,* 40 CFR 70.4(a), 70.4(i), 70.7. The EPA's expectations regarding this process are discussed in the 2016 Proposal.

V. Environmental Justice Considerations

The Agency proposes to remove affirmative defense provisions from the EPA's operating permit program regulations. If the rule is finalized, it may also be necessary for state, local and tribal permitting authorities to remove similar affirmative defense provisions from program regulations and from individual title V operating permits. None of these changes would alter the obligations of sources to comply with the underlying emission limits and other standards contained within title V operating permits.

Based on these considerations, the EPA expects that, if this action becomes final as proposed, the effects on minority populations, low-income populations and/or indigenous peoples would not be disproportionately high and adverse.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control numbers 2060-0243 (for part 70 state operating permit programs) and 2060-0336 (for part 71 federal operating permit program). In this action, the EPA is proposing to remove certain provisions from the EPA's regulations, which, if finalized, could

result in the removal of similar provisions from state, local, and tribal operating permit programs and individual permits. Consequently, states could eventually be required to submit program revisions to the EPA outlining any necessary changes to their regulations and their plans to remove provisions from individual permits. However, this action does not involve any requests for information, recordkeeping or reporting requirements, or other requirements that would constitute an information collection under the PRA.

C. Regulatory Flexibility Act (RFA)

I certify that this action would not have a significant economic impact on a substantial number of small entities under the RFA. This action would not impose any requirements on small entities. Entities potentially affected directly by this proposal include state, local, and tribal governments, and none of these governments would qualify as a small entity. Other types of small entities, including stationary sources of air pollution, would not be directly subjected to the requirements of this action.

D. Unfunded Mandates Reform Act (UMRA)

This action would not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and would not significantly or uniquely affect small governments. The action would impose no enforceable duty on any state, local or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action has tribal implications. However, it would neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. One tribal government (the Southern Ute Indian Tribe) currently administers an approved part 70 operating

permit program, and one tribal government (the Navajo Nation) currently administers a part 71 operating permit program pursuant to a delegation agreement with the EPA. These tribal governments may be required to take actions if this rule is finalized, including program revisions (for part 70 programs) and eventual permit revisions (for both part 70 and delegated part 71 programs), but these actions will not require substantial compliance costs. The EPA previously consulted with tribal officials when developing the 2016 Proposal and is planning to offer a similar consultation for the current proposal. The EPA also solicits comment from affected tribal governments on the implications of this rulemaking.

G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTA)

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes that this action would not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994).

The documentation for this decision is contained in section V of this action preamble titled, “Environmental Justice Considerations”.

VII. Statutory Authority

The statutory authority for this action is provided in CAA sections 502(b) and 502(d)(3), 42 U.S.C. 7661a(b) & (d)(3), which direct the Administrator of the EPA to promulgate regulations establishing state operating permit programs and give the Administrator the authority to establish a federal operating permit program. Additionally, the Administrator determines that this proposed action is subject to the provisions of CAA section 307(d), which establish procedural requirements specific to rulemaking under the CAA. CAA section 307(d)(1)(V) provides that the provisions of CAA section 307(d) apply to “such other actions as the Administrator may determine.” 42 U.S.C. 7607(d)(1)(V).

List of Subjects

40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

40 CFR Part 71

Environmental protection, Administrative practice and procedure, Air pollution control, Reporting and recordkeeping requirements.

Michael Regan,
Administrator.

For the reasons stated in the preamble, the EPA proposes to amend title 40 CFR parts 70 and 71 as follows:

PART 70—STATE OPERATING PERMIT PROGRAMS

1. The authority citation for part 70 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

§70.6 [Amended]

2. In § 70.6, remove and reserve paragraph (g).

PART 71—FEDERAL OPERATING PERMIT PROGRAMS

3. The authority citation for part 71 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

§71.6 [Amended]

4. In §71.6, remove and reserve paragraph (g).

[FR Doc. 2022-06907 Filed: 3/31/2022 8:45 am; Publication Date: 4/1/2022]